

# Rules and Regulations

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## OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 302, 317, 319, 330, 731,  
754, and 920

RIN 3206-A000

### Fair Chance To Compete for Jobs

**AGENCY:** Office of Personnel  
Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations governing when, during the hiring process, a hiring agency can request information typically collected during a background investigation from an applicant for Federal employment. In addition, OPM is issuing new regulations establishing the requirement for the timing of collection of criminal history information and for governing complaint procedures under which an applicant for a position in the civil service may submit a complaint, or any other information, relating to compliance by an employee of an agency in reference to the timing of collection of criminal history information. Furthermore, the final rule outlines adverse action procedures that apply when it is alleged that an agency employee has violated the requirements and appeal procedures that will be available from a determination by OPM adverse to the Federal employee. Nothing in this rule shall be read in derogation of any individual's rights under Title VII. This rule implements the Fair Chance to Compete for Jobs Act of 2019 (Fair Chance Act). With some exceptions, the Fair Chance Act prohibits Federal agencies and Federal contractors acting on their behalf from requesting that an applicant for Federal employment disclose criminal history record information before the agency makes a conditional offer of employment to that applicant. The Fair Chance Act identifies some positions to which the prohibition shall not apply. It

also requires OPM to establish complaint procedures under which an applicant for a position in the civil service may submit a complaint, or any other information, relating to compliance with the Fair Chance Act by an employee of an agency, establishes minimum penalties and procedures to be followed before a penalty may be assessed, and requires OPM to establish appeal procedures available in the event of a determination adverse to the Federal employee.

**DATES:** Effective October 2, 2023.

**FOR FURTHER INFORMATION CONTACT:**

Timothy Curry by email at [employeeaccountability@opm.gov](mailto:employeeaccountability@opm.gov) or by telephone at (202) 606-2930, with respect to 5 CFR part 754; Lisa Loss by email at [SuitEA@opm.gov](mailto:SuitEA@opm.gov) or by telephone at (202) 606-7017, with respect to 5 CFR part 731; and Mike Gilmore by email at [Michael.Gilmore@opm.gov](mailto:Michael.Gilmore@opm.gov) or by telephone at (202) 936-3261, by fax at (202) 606-4430, or by TTY at (202) 418-3134 for all other parts.

**SUPPLEMENTARY INFORMATION:**

**Background**

Provisions of the Fair Chance Act were incorporated into the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), which was signed into law by the President on December 20, 2019. The Fair Chance Act places limitations on agency requests for criminal history record information prior to a conditional offer of employment. It also requires a complaint process by which applicants for appointment to a position in the civil service may submit a complaint, or any other information, relating to compliance with the requirements of the Fair Chance Act. Furthermore, the Fair Chance Act establishes requirements and procedures regarding penalties for violations. Because of these statutory requirements, OPM issued proposed regulations published at 87 FR 24885, April 27, 2022, pertaining to when, during the hiring process, a hiring agency can request information typically collected during a background investigation from an applicant for Federal employment.

**The Existing 'Ban the Box' Rule**

On December 1, 2016, OPM issued a final rule at 81 FR 86555 that revised its regulations pertaining to when, during

the hiring process, a hiring agency can request information typically collected during a background investigation from an applicant for Federal employment. The changes were to promote compliance with Merit System Principles as well as the goal of the Federal Interagency Reentry Council and the Presidential Memorandum of January 31, 2014, "Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulty Through No Fault of Their Own," otherwise known as "Ban the Box" rules. As noted by OPM when it first promulgated the rule, the intent of the rule was to conform regulatory requirements to what OPM believed was already the predominant agency practice, as many agencies already employed the practice of waiting until the later stages of the hiring process to collect criminal history information.

Current OPM regulations at 5 CFR parts 330 and 731 prevent agencies, unless an exception is granted by OPM, from making inquiries into an applicant's criminal or credit history of the sort asked on OPM Optional Form (OF) 306, titled Declaration for Federal Employment, in the 'Background Information' section or other forms used to conduct suitability investigations for Federal employment unless the hiring agency has made a conditional offer of employment to the applicant. The Fair Chance Act contains the same prohibition with respect to criminal history and does not address credit history. The Fair Chance Act has elaborated on the methods of inquiry not permitted and provides for certain exceptions to the rule. Furthermore, the Fair Chance Act requires OPM, when making additional exceptions, to give due consideration to positions that involve interaction with minors, access to sensitive information, or managing financial transactions.

The OF 306 is used to assist OPM and Federal agencies in determining a person's suitability for employment as well as to provide other information that is required of applicants. Applicants must answer the questions on the form before they can be appointed or converted to a new appointment in the competitive, excepted, or Senior Executive Service. For most of the information on the OF 306, agencies may determine the timing of the

collection of the OF 306 in the application and hiring process; however, unless permitted by law, they may not ask applicants to answer the questions on the form that address criminal history information until a conditional offer of employment has been extended. Further, unless they have been granted an exception by OPM, agencies may not ask individuals to complete the question that relates to credit history. Most applicants are likely to be asked to complete the form after a conditional offer of employment has been made. OPM's authority to direct Federal agencies to use the OF 306 is found in 5 U.S.C. 1302, 3301, 3304, 3328, 7301, and 8716; 5 CFR part 731; and E.O. 10577 and E.O. 13467, as amended. The OF 306 is one aspect of vetting that can be collected, in accordance with the provisions outlined in this rule, and used to begin to assess suitability in advance of the initiation of a required background investigation.

### Explanation of OPM's Final Rule Under the Fair Chance Act

#### 1. Restrictions on Preemployment Criminal Inquiries

OPM is issuing these provisions under section 1122(b)(1) of the Fair Chance Act, under which the Director of OPM "shall issue such regulations as are necessary to carry out chapter 92 of title 5, United States Code (as implemented by this subtitle)." OPM is also issuing these provisions to implement the requirements of 5 U.S.C. 9202(c)(2), as added by the Fair Chance Act, which requires the OPM Director to issue regulations identifying positions with respect to which the prohibition shall not apply giving due consideration to positions that involve interaction with minors, access to sensitive information, or managing financial transactions, beyond those already identified in the statute.

Unless otherwise required by law, an employee of an agency may not request, in oral or written form (including through the Declaration for Federal Employment (OF 306) or any similar successor form, the USAJOBS internet website, or any other electronic means) that an applicant for an appointment to a position in the civil service disclose criminal history record information regarding the applicant before the appointing authority extends a conditional offer to the applicant. Under the provisions of the Fair Chance Act, this prohibition does not apply under the following circumstances:

- Determinations of eligibility described under clause (i), (ii) or (iii) of 5 U.S.C. 9101(b)(1)(A) *i.e.*, for (i) access

to classified information; (ii) assignment to or retention in sensitive national security duties or positions; or (iii) acceptance or retention in the armed forces; or

- Recruitment of a Federal law enforcement officer (defined in 18 U.S.C. 115(c)).

The Fair Chance Act applies to all appointments in the Executive branch; *i.e.*, to appointments in the competitive service, the excepted service, and the Senior Executive Service (SES). Therefore, OPM is (1) revising the provisions in 5 CFR part 330, subpart M, which currently implements the Ban the Box rules for the competitive service, by removing the reference to criminal history so that the Fair Chance Act can be implemented for all types of appointments in a newly created part 920; (2) preserving the existing Ban the Box rules restricting pre-employment credit inquiries for appointments in the competitive service; and (3) amending part 731 to incorporate the exceptions to this provision as established by law and to refer agencies to the newly created part 920 for guidance on other types of positions for which the prohibition under the Fair Chance Act for collecting criminal history information will not apply. For the convenience of the reader, we are placing these provisions in the newly created part 920 rather than repeat the provisions in parts 302, Employment in the Excepted Service; 317, Employment in the Senior Executive Service; 319, Employment in the Senior-Level and Scientific and Professional Positions; 330, Recruitment Selection, and Placement (General); and 731, Suitability. OPM also amends parts 302, 317, and 319 to include a reference as a reminder that these types of positions are subject to the provisions of the Fair Chance Act found in chapter 92 of title 5, U.S.C., and 5 CFR part 920.

This final rule will continue to permit agencies to make an objection, pass-over request, or suitability determination on the basis of criminal or credit history record information only after the applicant's qualifications for the position being filled have been fairly assessed and the hiring agency has made a conditional offer of employment to the applicant. Exceptions previously granted to agencies by OPM pursuant to 5 CFR part 330 subpart M (*i.e.*, the Ban the Box provisions) continue to be valid.

#### 2. Complaint, Adverse Action, and Appeal Procedures

Under section 9203, the Fair Chance Act requires the Director of OPM to establish and publish procedures under which an applicant for an appointment to a position in the civil service may

submit a complaint, or any other information, relating to compliance by an employee with 5 U.S.C. 9202. Under the provisions of section 9204, the Fair Chance Act further establishes minimum requirements regarding penalties for violations of the Fair Chance Act and provides that such penalties may be entered only after notice to the Federal employee accused and an opportunity for a hearing on the record (thereby, indirectly, establishing minimum procedural requirements before an adverse determination can be made). Finally, the Fair Chance Act requires the Director of OPM, by rule, to establish procedures providing for an appeal from any adverse action taken under section 9204 by no later than 30 days after the date of the action. The Fair Chance Act further notes in section 9205 that an adverse action taken under the Fair Chance Act shall not be subject to the procedures under chapter 75 of title 5 or, except as provided for in the appeal process established under the Fair Chance Act, be subject to appeal or judicial review. Therefore, OPM is issuing final regulations governing complaint procedures under which an applicant for a position in the civil service may submit a complaint, or any other information, relating to compliance by an employee of an agency with section 9202 of title 5, and adverse action and appeal procedures for alleged violations of section 9202 of title 5.

#### Public Comments

In response to the proposed rule, OPM received 20 comments during the 60-day public comment period from individuals (including Federal employees), organizations, and Federal agencies. At the conclusion of the public comment period, OPM reviewed and analyzed the comments. In general, the comments ranged from categorical rejection of the proposed regulations to strong support. OPM reviewed and carefully considered all comments and arguments made in support of and in opposition to the proposed changes. The comments are summarized below, together with a discussion of the suggestions for revision that were considered and either adopted, adopted in part, or declined, and the rationale therefor. Finally, comments beyond the scope of the proposed changes or which were vague or incomplete are not addressed below.

In the first section below, we address general or overarching comments. In the sections that follow, we address comments related to specific portions of the regulations.

## General Comments

Some commenters offered support for the Fair Chance Act because it provides individuals who have been incarcerated an opportunity to be considered for employment based upon their skills and experience rather than what may be irrelevant, inaccurate, or stale criminal history records. One commenter shared their perspective that wrongful convictions happen often, and individuals who did commit the crime have time to reflect and change for the better. This commenter opined that the requirements of the Act should be enough for them to get another chance at life and redeem themselves. Similarly, another commenter shared their perspective that a lot of people are incarcerated for unfair reasons, and they and others who perhaps did commit the crime deserve a second chance.

OPM agrees that the Fair Chance Act advances important goals in that it places limitations on actions Federal agencies may take in the hiring process that would be detrimental for individuals who have been incarcerated. OPM's implementing regulations allow job applicants to present their qualifications and abilities for assessment and to be considered solely based on their merits without the specter of a criminal record during the selection process. Consistent with the statute, the regulations provide the opportunity for a qualified applicant with a criminal history record to advance in the hiring process in the same manner as a qualified applicant without a criminal history record.

Several organizations commended OPM for taking steps to implement strong regulations. These organizations stated their support for "the adoption of final regulations that provide additional clarity to both hiring agencies and the public, allow for effective enforcement of the new law, and reinforce the clear language and intent of the Fair Chance Act." In addition, the organizations expressed gratitude for OPM's commitment to effectively implementing the Fair Chance Act. These organizations also requested that OPM incorporate additional protections and clarifications into the final rule. OPM notes that several public comments resulted in additional clarifications and changes in this final rule. These changes are addressed below in their respective areas of the Supplementary Information section of this preamble. OPM will address other comments in guidance that it will be issuing to assist agencies with implementing the requirements of this rule.

As for more general comments, one commenter stated that the proposed rule ensures "criminals gain employment." This commenter characterized the rule as a political tactic and questioned how the proposed rule would help the government other than add union employees. Also, the commenter shared their observation of numerous employees leaving the government to seek a "higher professional working atmosphere."

These final implementing regulations resulted from a bipartisan law that enjoyed Congressional support across two Administrations. The scope of OPM's regulations is determined by the contours of the law Congress drafted and directed OPM to implement. As such, OPM will not make any revisions to the rule based on this comment. This regulation prohibits Federal agencies and Federal contractors acting on their behalf from requesting that an applicant for Federal employment disclose criminal history record information before the agency makes a conditional offer of employment to that applicant. This final rule does not eliminate the requirement of agencies performing their due diligence in examining an applicant's criminal history or other relevant background information once a conditional offer of employment has been extended. Further, this regulation improves the government by supporting the Administration's initiative on diversity, equity, inclusion, and accessibility (DEIA), further positioning the Federal government as a model employer, and providing opportunities for talented, skilled individuals—both with and without a criminal history record—to put their talents to use to advance the mission of the Federal Government.

OPM disagrees that this rule will diminish professionalism in the Federal workforce. As stated in the regulatory impact analysis of this rule, studies show that employment is the single most important factor in reducing recidivism; people with criminal history records are no more likely to be fired for misconduct than people without records; and they are statistically less likely to quit, which saves employers in turnover costs. Therefore, the regulations benefit not only the Federal government as an employer but also American society as a whole and at the family and community levels.

Two individuals suggested changes based on the type of offense committed. One commenter, who generally supported the rule, stated that the rule may be too broad in removing access to criminal history. The individual suggested that people who have been

convicted of sexual or violent offenses still be screened, but people whose records do not reflect a threat to safety have that barrier removed. Another commenter asked OPM to create an exception to the proposed rule for sexual offenders, specifically, suggesting that this exception would permit agencies to eliminate applicants who are sexual offenders from the hiring process before determining whether they qualify for a position.

OPM cannot adopt these suggestions because they are contrary to the text of the Fair Chance Act. The Fair Chance Act makes it unlawful, with few exceptions, to request criminal history from an applicant before the agency makes a conditional offer of employment to that applicant. As discussed, OPM's implementing regulations allow job applicants to present their qualifications and abilities for assessment and be considered based on their merits without the specter of a criminal history record during the selection process. The regulations provide the opportunity for qualified applicants with criminal history records to advance in the hiring process just as a qualified applicant without a criminal history record would advance. Moreover, in most cases, the separate personnel vetting determination can and should occur after the selection process and a conditional offer of employment has been made, thereby separating criminal history as an aspect of the vetting process from factors that are relevant at the time of the initial hiring assessment.

Two agencies commented that they already make offers of conditional employment before requesting criminal history, so this rule will have no negative impact to their policies and procedures.

Below we summarize the public comments that are most appropriately addressed by reference to the specific portion of the regulations to which the comments applied.

### Part 302—Employment in the Excepted Service

This final rule adds § 302.107 to subpart A to incorporate the requirements of the Fair Chance Act. This section addresses when inquiries into an applicant's criminal history may be made and circumstances under which exceptions may be requested and considered by OPM.

OPM received no comments on this section.

### **Part 317—Employment in the Senior Executive Service**

This final rule adds § 317.202 to subpart B to incorporate the requirements of the Fair Chance Act. Section 317.202 addresses when inquiries into an applicant's criminal history may be made and circumstances under which exceptions may be requested and considered by OPM.

OPM received no comments on this section.

### **Part 319—Employment in Senior-Level and Scientific and Professional Positions**

This final rule adds § 319.106 to subpart A to incorporate the requirements of the Fair Chance Act. Section 319.106 addresses when inquiries into an applicant's criminal history may be made and circumstances under which exceptions may be requested and considered by OPM.

OPM received no comments on this section.

### **Part 330—Recruitment, Selection, and Placement (General)**

The Fair Chance Act does not specifically address the timing of suitability inquiries into a job applicant's credit history. The Presidential Memorandum on Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulty Through No Fault of Their Own of January 31, 2014, however, addresses credit history and is still in effect. Consistent with existing law and the Presidential Memorandum, OPM's revision of § 330.1300 retains its prohibition on making inquiries into a job applicant's credit history and removes any reference to criminal history. The prohibition on using criminal history is addressed in part 920.

OPM received no comments on this section.

### **Part 731—Suitability**

The Fair Chance Act does not specifically address the timing of suitability inquiries into a job applicant's credit history. The Presidential Memorandum on Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulty Through No Fault of Their Own of January 31, 2014, however, addresses credit history, and is still in effect. In accordance with this Memorandum, applicants should not face undue obstacles to Federal employment

because they are unemployed or face financial difficulties through no fault of their own. Agencies must take steps to ensure fair treatment of all applicants, as well as Federal employees, throughout the recruiting and hiring process. One of the ways that Federal agencies can ensure fair treatment for applicants who have experienced periods of unemployment and/or financial difficulty is to avoid unnecessary screening mechanisms, especially at early stages of the hiring process, before a candidate's qualifications have been fully assessed. Consistent with existing policy and the Presidential Memorandum, OPM's revision of § 731.103(d)(1) retains the prohibition on making inquiries into a job applicant's credit history and updates the reference to the prohibition relating to criminal history to align with the new part 920, which reflects the requirements of the Fair Chance Act. Both reduce the opportunity for information to be misused at the preliminary screening stage.

Several organizations addressed the proposed changes to this part in conjunction with changes to part 920. The comments that address the content of both parts are summarized below. Several organizations commented that language in § 731.103(d)(1) is less clear than in § 920.102(b) with regard to positions that are exempt because the hiring agency is required by statute to make inquiries into an applicant's criminal history prior to making a conditional offer. The organizations raised concerns that the language may be misconstrued as allowing exemptions any time consideration of criminal history is required by law, even if the timing is not mandated by law. OPM agrees and will make a change for clarity, by striking the portion of the sentence reading "Except as required by law."

### **Part 754—Complaint Procedures, Adverse Actions, and Appeals for Criminal History Inquiries Prior to Conditional Offer**

An organization expressed support for OPM's proposed new part 754, which the organization stated "creates a compliance mechanism for aggrieved applicants affected by 'Ban the Box' violations and disciplinary mechanisms for employees who continue to unlawfully require pre-offer of disclosure of criminal or credit history in violation of the Fair Chance Act."

#### **Subpart A—Complaint Procedures**

The Fair Chance Act directs OPM to establish and publish procedures under which an applicant for an appointment

to a position in the civil service may submit a complaint, or any other information, regarding compliance with 5 U.S.C. 9202. Based on these unique requirements, OPM adds a new 5 CFR part 754 to implement the complaint procedure requirements of the Fair Chance Act. The rule appears in subpart A of 5 CFR part 754 as "Complaint Procedures." This final rule provides the regulatory framework for the complaint process for job applicants to allege violations of the nature described in the Fair Chance Act. This regulatory scheme is significant because job applicants do not have the ability to use any existing statutory or regulatory complaint procedures that may be available for other employment-related complaints, such as those of the U.S. Office of Special Counsel, which investigates prohibited personnel practices.

Subpart A establishes procedures under which an applicant for an appointment to a position in the civil service may submit a complaint, or any other information, relating to compliance by an employee of an agency with section 9202, as required by section 1122(b)(1) of the Fair Chance Act.

#### *Section 754.101 Coverage*

This final rule describes who may use the agency complaint procedures and the actions covered and provides key terms that track the definitions in part 920.

OPM received no comments on this section.

#### *Section 754.102 Agency Complaint Process*

This section establishes the complaint process to be utilized for actions taken under this part. The process includes respective roles for OPM and Federal government agencies.

Several organizations observed that OPM's proposed regulations include key protections and clarifications, which the organizations urged OPM to retain in the final rule, including the complaint and investigation process as required by the Fair Chance Act. In addition to the strengths they recognized in the proposed regulations, the organizations urged OPM to incorporate additional protections and clarifications into the final rule, including ensuring the complaint processes implemented by hiring agencies are fair and transparent. These organizations expounded that, in addition to individual agency processes for receiving complaints, OPM should clarify some of the elements of the complaint process as well as enhance

protections as reflected immediately below.

Regarding § 754.102(a), some organizations recommended that OPM develop a centralized means for receiving complaints and forwarding them to the appropriate agency for an agency investigation. Organizations expressed concern that, while the rule requires each hiring agency to establish and publicize systems for receiving complaints from applicants regarding violations of the Fair Chance Act, some job applicants will likely remain confused as to whom to submit such a complaint or may feel more comfortable submitting a complaint directly to OPM instead of to the hiring agency that likely just rejected them for a job based on their criminal history record. These organizations posited that, even if OPM does not implement a centralized means for receiving Fair Chance Act complaints, the regulations should provide that any complaint related to a violation of the Fair Chance Act that is submitted directly to OPM shall be forwarded to the appropriate agency for investigation and will be considered timely if it was submitted to OPM within the time period described in the regulations.

OPM is confident that agencies will develop complaint processes that are fair and transparent, making centralized complaint intake unnecessary. Notably, the rule requires that agencies include information about the complaint process in their job announcements. This public notice aids in accomplishing complaint process transparency. Therefore, OPM will decline to adopt the organizations' recommendations to establish a centralized complaint process. As stated in the proposed rule, OPM believes there is ample precedent for agencies to establish internal procedures for receipt and investigation of employment-related complaints against the agency and to accomplish these tasks in a fair and impartial manner. Moreover, adding a procedural layer that involves OPM receiving a complaint and forwarding it to the appropriate agency adds time to the process that may delay resolution of the matter which would disserve applicants. Additionally, OPM does not have the resources necessary to effectively administer a new government-wide complaint process, and we have concluded that it is more efficient and cost-effective for agencies to leverage their existing resources. That said, to the extent OPM receives a complaint, OPM will promptly forward it to the appropriate agency.

As stated in the proposed rule, direct submission of complaints to agencies is a long-standing process with which the

public is familiar. For example, currently, applicants submit Federal sector equal employment opportunity (EEO) complaints to agencies rather than to the Equal Employment Opportunity Commission (EEOC). Thus, if OPM were to change this long-standing process as the commenter seeks, it may create—not prevent—confusion.

To ensure applicants are informed, OPM encourages agencies to widely publicize information about the Fair Chance Act complaint process to job applicants, and, as stated above, agencies' job announcements must include information about the complaint process. OPM also notes that one safeguard the rule affords is that applicants have an opportunity to submit a complaint or any other information after 30 days if the applicant's rights to do so were not properly publicized. In addition, the agency must conduct outreach to inform an applicant of the procedure for submitting a complaint when it has reasonable cause to believe that the applicant is attempting to file a complaint. The employing agency has the ability to extend the 30-day time limit when an applicant shows that the applicant was not notified of the time limits and was not otherwise aware of them, that the applicant did not know and reasonably should not have known that the non-compliance with section 9202 and part 920 occurred, to consider a reasonable accommodation of a disability, or for other proper and adequate reasons considered by the agency. The agency must apply the regulatory provisions to determine if a complaint forwarded by OPM was timely filed, or if there is proper and adequate basis for an extension.

Additionally, with respect to § 754.102(a), an organization recommended that OPM consider “whether a more robust set of standards is needed to ensure that agencies will not brush aside complaints.” The organization stated that allowing complainants the option of submitting complaints directly to OPM in lieu of to the agency (as an alternative to concurrent and centralized intake as discussed above) offers a method whereby effective standard-setting and robust enforcement could be better ensured.

OPM will not make any revisions based on this comment. For the same reasons that OPM will not adopt concurrent or centralized complaint intake, OPM will not accept the recommendation to allow applicants to submit complaints directly to OPM. Agencies routinely receive and

investigate allegations of wrongdoing against agency employees, including complex and sensitive matters such as off-duty misconduct, on-duty drug or alcohol use, and workplace harassment. An alleged violation of section 9202 of the Fair Chance Act and part 920 is well within the range of misconduct that agencies can handle in a fair and impartial manner.

Although we did not receive a comment in regard to § 754.102(a)(3), this rule corrects a cross reference in the regulatory text. The corrected reference now states “paragraph (a)(2) of this section” instead of “paragraph (b) of this section”.

In discussing the agency investigation process as outlined in § 754.102(b), an organization discussed that § 754.102 delegates to the employing agencies the task of ensuring compliance with the Fair Chance Act by having the agencies receive and investigate complaints made against them. The organization noted that the rule places a restriction that the same official cannot be both the executing-advising officer for the recruitment and the investigator. The organization stated, “. . . that is surely part of the minimum that should be expected of any investigatory process but likely does not go far enough in ensuring an impartial process.”

OPM disagrees with the organization's assertion that the investigatory process as outlined in § 754.102(b) is insufficient to achieve an impartial process. OPM believes there is abundant precedent, such as appeals of agency classification decisions and agency programs related to eliminating discriminatory practices and policies, for agencies to establish internal procedures for receipt and investigation of employment-related complaints in a fair and impartial manner. An agency must follow its investigatory procedures and gather all relevant information about an alleged violation of 5 U.S.C. 9202 and 5 CFR part 920. The investigation will be the foundation for an assessment of what misconduct, if any, occurred and any individual(s) responsible. Upon receipt of the agency's administrative report, OPM will consider the specific facts and circumstances on a case-by-case basis to determine whether to proceed. OPM believes that with appropriate OPM guidance and oversight, agencies can effectively investigate violations of Fair Chance Act requirements.

In further discussion of the agency investigation, an organization recommended that OPM should allow complainants to make submissions to OPM that would supplement, correct, or rebut the factual record that the agency's

investigative process yielded pursuant to the agency's administrative report under § 754.102(b)(5). The organization recommended also that a complainant be allowed to make submissions of facts directly to OPM either in parallel to the agency's required report or within a reasonable time after being notified of the report's contents, before OPM adjudication takes place.

OPM will not make any revisions based on this comment. Part 754 lays out a straightforward administrative process with a framework for complaint intake and investigation that provides clear parameters and, where appropriate, agency discretion. Along with the complaint itself, an applicant may submit any other information the applicant deems necessary to ensure a complete factual record before OPM's adjudication takes place. The agency's administrative report to OPM should include "a complete copy of all information gathered during the investigation." If OPM needs additional information from an applicant or agency employee for the purpose of adjudicating the complaint, OPM may make a request to the agency. For these reasons, it is unnecessary to create a mechanism for applicants to make submissions directly to OPM.

Some organizations recommended with respect to § 754.102(b) that OPM "ensure sufficient time for a complainant to respond to a hiring agency's request for information." These organizations also urged OPM to put mechanisms in place that "ensure that agencies do not use a complainant's failure to quickly respond to a request for additional information as an excuse for abandoning an investigation." The organizations continued that, in some cases, additional information beyond the initial complaint may not truly be needed from the complainant, and the investigation should therefore not be suspended even if the complainant fails to respond.

In response to these comments, and as discussed in greater detail below, we have added regulatory text to provide an objective timeframe of 10 days for applicants to respond to a request for additional information, yet we also indicate that the agency may extend this timeframe if the agency deems that extenuating circumstances warrant extension. Further, OPM would discourage agencies from using a complainant's failure to respond or failure to "quickly respond" to a request for additional information as the sole reason for abandoning an investigation. Instead, agency investigators should determine whether they can otherwise develop a record that allows a

reasonable fact finder to draw conclusions as to whether non-compliance with section 9202 and part 920 occurred.

Furthermore, the organizations stated that the regulations must require hiring agencies to provide complainants with a reasonable amount of time to respond to any such requests for information. The commenters asserted that it is not a complainant's job to follow up on the complaint, and in fact, complainants will likely have been denied a job opportunity by the agency and may be employed elsewhere, still in search of employment while the investigation proceeds, or living under stresses related to unemployment, which could impact their ability to respond quickly. One of the organizations, speaking on behalf of itself and several collaborating organizations, opined that OPM's rule appropriately includes a time limit for an agency to complete its investigation so that investigations do not drag on indefinitely.

For these reasons, the organizations recommended that complainants receive 30 days to respond to such requests. They further suggested that OPM may wish to also provide in the regulations that an agency may receive additional time to complete the investigation beyond the 60-day investigative period if the complainant takes unusually long to respond.

OPM agrees with this recommendation to specify a reasonable amount of time for an applicant to respond to any such request for information during the investigation, which is consistent with OPM's establishment of a time limit for the investigation. Under ordinary circumstances, OPM believes a period of 10 calendar days from the date of the request is reasonable and balances the need for timely conclusion of the investigation. This brief but sufficient response period of 10 calendar days does not require additional time beyond the 60-day investigative period. However, as stated above, the agency may extend the applicant's response period for extenuating circumstances. In addition, an agency may extend the investigation period if the agency provides more than 10 calendar days for the applicant to respond to an agency's request for information.

An organization expressed concern that § 754.102(b)(2) delegates to agencies the discretion to determine the appropriate fact-finding methods for investigating the complaint, "subject only to the oversight and future issuances described respectively in proposed sections 754.102(d)(1) and (d)(3)" and recommended that OPM

consider if more rigorous standards are needed.

OPM will not make any changes based on this comment. To reiterate, OPM believes there is abundant precedent, such as appeals of agency classification decisions and agency programs related to eliminating discriminatory practices and policies, for agencies to establish internal procedures for investigation of employment-related complaints in a fair and impartial manner. OPM believes that with appropriate OPM guidance and oversight, agencies can effectively investigate violations of Fair Chance Act requirements.

In further response to comments that expressed support for additional clarity for hiring agencies and a final rule that is effective and efficient, § 754.102(b)(5) will also permit the agency to send its administrative report to OPM via electronic mail at *employeeaccountability@opm.gov* as an alternative to postal delivery as proposed.

Regarding § 754.102(c), some organizations recommended that OPM require that the hiring agency and/or OPM inform the complainant of the results of an investigation and the ultimate findings. One of the organizations, speaking on behalf of itself and several collaborating organizations, noted that in § 754.102(c)(2), "the subject of the complaint" appears to refer to the agency employee who allegedly inquired about an applicant's criminal history record before a conditional offer. The organizations asserted that the regulations are silent on when, how, and by whom the complainant will be notified of the result of OPM's adjudication, and a complainant is another interested party who should be timely informed of the outcome. The organizations urged OPM to supplement § 754.102(c)(2) to specify that OPM will simultaneously notify the complainant in writing of its findings and decision.

OPM will not revise § 754.102(c) based on this comment. It is correct that the subject of the complaint is the agency employee who allegedly violated section 9202 of the Fair Chance Act and part 920 of this regulation. OPM plans to issue guidance to assist with implementation of this rule. An agency may only share information from the records concerning an individual's Fair Chance Act complaint pursuant to the Privacy Act and the applicable system of records notice, for example, with those who have a need to know, such as human resources staff involved in advising management and any management official responsible for

approving the action, or others to whom disclosure is permitted pursuant to a routine use. As an interested party, an applicant has the option of submitting a Freedom of Information Act request to obtain any releasable information about the investigation and outcome.

OPM is revising the wording of § 754.102(c) to clarify that OPM will notify the agency and the subject(s) of the complaint regarding OPM's assessment that a violation may have occurred such that OPM is initiating the subpart B adverse action proceedings.

#### *Section 754.103 Applicant Representatives*

This section describes the requirements for an applicant's representative.

An agency asked if it is OPM's intent that an applicant under the definition be considered part of the bargaining unit if the position is a covered position. It is not OPM's intent that an applicant, who is not already employed by the agency in a bargaining unit position, as defined in newly created part 920, be considered part of the bargaining unit solely because the position for which the individual applied is covered by a collective bargaining agreement. OPM believes it is appropriate and fair for an applicant to receive assistance throughout the complaint process, subject to the restrictions outlined in § 754.103.

#### **Subpart B—Adverse Actions**

OPM adds subpart B, Adverse Actions, which describes the adverse actions and appeals process related to violations of the Fair Chance Act. This new subpart also describes the specific penalties to be imposed by OPM for each violation of 5 U.S.C. 9202. These provisions are significant because under the Fair Chance Act, the procedures of chapter 75 of title 5, United States Code, Adverse Actions, are not applicable and appeal or judicial review is not applicable except as provided under procedures established by the Director of OPM.

#### *Section 754.201 Coverage*

This section describes which actions and employees are covered by the new adverse action procedures established by OPM pursuant to the Fair Chance Act and defines key terms used in the subpart.

OPM received no comments on this section.

#### *Section 754.202 Penalty Determination*

This section describes the specific penalties OPM may direct an agency to process when an agency employee has

been found to have violated section 9202 of the Fair Chance Act. The Fair Chance Act specifies certain penalties for violations of the statute, which are written warnings, suspensions without pay, and civil penalties of various amounts depending on the violation. Notably the range of penalties under the Fair Chance Act includes some forms of penalty that are not enumerated under the "adverse actions" provisions found in chapter 75 of title 5, United States Code (written warnings, civil penalties). For certain violations, under the Fair Chance Act OPM can direct the employing agency to collect a civil penalty and remit it to the Treasury, for deposit in the Treasury. OPM invited public comment on the method for collecting and remitting civil penalties. However, we did not receive any such comments.

A commenter asserted that current case law shows that the proposed penalty determinations are inconsistent with penalties upheld for violating Federal regulations. This commenter opined that, while these recommendations include increasing days of suspensions and adding civil penalties for the fourth and greater offenses, they are still setting precedent that a Federal employee could violate Federal regulations more than five times and still maintain their Federal employment. The commenter suggested adjusting penalty determinations to include proposed removal for multiple violations of the Fair Chance Act, decrease the number of potential violations that have penalty determinations, and add an aggravating factor of intent to violate government regulations as a reason to increase the penalty on an earlier offense. The commenter requested, to the degree that OPM can influence the penalties required, that discretion be afforded to the agencies so they can weigh relevant factors.

OPM will not make any revisions based on this comment. Congress, through the Fair Chance Act, prescribed the range of penalties OPM may direct an agency to process when an agency employee has been found to have violated section 9202 of the Fair Chance Act and part 920 of this regulation. Therefore, OPM will not add removal to the penalty range, decrease the number of violations prescribed as a threshold for a certain penalty, or add an aggravating factor of intent to the regulation. Note that OPM is the proposing and deciding authority for penalties imposed for section 9202 violations. Accordingly, OPM, not the employing agency, is responsible for evaluating the facts and circumstances

in each case. Also, the penalty scheme developed by Congress in the Fair Chance Act is unique to violations of section 9202 of the Act.

An agency shared observations that written warnings are maintained in a local file and removed after a certain period, and reprimands are maintained in an employee's Official Personnel Folder (OPF) temporarily and removed after a certain period. The agency asked if it is OPM's intent to have "reprimands" for violations of section 9202 maintained on the permanent side of an employee's OPF.

OPM will not make any revisions based on this comment. OPM notes that Congress elected not to include a reprimand in its prescribed range of penalties for a violation of section 9202 of the Act, and we will not add a reprimand as a penalty option. To clarify, section 9204 of the Act defines a written warning as an adverse action for the purpose of addressing a first violation of section 9202. Further, the Act specifies that after OPM provides procedural rights, if we determine that an employee has committed a first violation of section 9202, OPM shall issue a written warning that includes a description of the violation and the additional penalties that may apply for subsequent violations, and direct the employee's agency to file such warning in the employee's official personnel record. Thus, a written warning issued under § 754.202 is an adverse action and is subject to the same procedures as other adverse actions, including permanent retention in the employee's OPF.

OPM is revising its proposed regulatory text for § 754.202(a) to parallel the language in paragraph (b), making clear that the process for a penalty determination for the first violation and subsequent violations is the same and that OPM's determination of violation and imposition of a penalty occurs only after the employee has been provided the procedural rights in § 754.203.

#### *Section 754.203 Procedures*

The final rule establishes the procedures to be utilized for actions taken under this subpart.

OPM received no comments on this section.

#### *Section 754.204 Appeal Rights*

This section describes the appeal rights for those actions taken by OPM under § 754.203. Appeal rights are conferred for suspensions of more than 14 days or any decision to impose a civil penalty under this subpart.

OPM received no comments on this section.

#### *Section 754.205 Agency Records*

This section outlines the records that OPM and the covered agency must maintain and their obligations under the Privacy Act.

An organization asserted that the proposed rule provides no guidance about how the investigatory process should handle private or sensitive information that may be disclosed, intentionally or inadvertently, in the course of the fact-gathering and reporting process. The organization recommended that OPM consider analyzing and potentially issuing guidelines or revised rules that would require that the processes to implement the Fair Chance Act requirements are consistent with the intent of the statute and other applicable Federal law concerning privacy and sensitivity of personal information including but not limited to criminal conviction-related history. The commenter also suggested that agencies and OPM take into account local, Tribal, and State privacy and fair chance-type laws when carrying out their investigatory and oversight responsibilities under this rule.

We disagree with the organization's assertion that the rule provides no guidance about the handling of private or sensitive information that may be disclosed, intentionally or inadvertently, in the course of the investigatory process. In the Supplemental Information section of the proposed rule, OPM addressed handling of private or sensitive information by stating that OPM and agencies have obligations under the Privacy Act. Private or sensitive information disclosed during the investigation will be added to the agency's administrative file and is covered by Federal law in accordance with the Privacy Act requirements of this section. Indeed, the regulatory text for § 754.205 states, "The complaint, the applicant's supporting material, the agency's administrative file, the notice of the proposed action, the employee's written reply, if any, any summary or transcript of the employee's oral reply, if any, the notice of decision, and any order to the covered agency effecting the action together with any supporting material, must be maintained in an appropriate system of records under the Privacy Act."

Regarding the organization's recommendation that agencies and OPM consider local, Tribal, and State privacy and fair chance-type laws, OPM will not make any revisions to this rule. As noted above, the records received through the Fair Chance complaint

investigation process are subject to the requirements of the Privacy Act. Federal agencies have well-established Privacy Act programs. Under the Privacy Act and other Federal laws, records are protected from unauthorized access and misuse through various administrative, technical, and physical security measures. OPM's regulations and guidance implement applicable Federal statutes for Federal personnel management. Congress has not authorized coverage under any other type of law for the Fair Chance Act implementation.

#### **Part 920—Timing of Criminal History Inquiries**

OPM is regulating the provisions of the Fair Chance Act in 5 CFR part 920 because these provisions apply to positions in the excepted, Senior Executive, and competitive services. For the convenience of the reader, we are placing them in one location rather than repeat the provisions in parts 302, 317, 319, and 330, respectively. Additionally, some agencies may have positions that are exempt from part 302 but not exempt from the provisions of the Fair Chance Act.

#### **Subpart A—General Provisions**

Subpart A of part 920 contains general provisions that are applicable to the timing of criminal history inquiries. This subpart explains which positions are covered by this part and which positions may be excluded. This subpart also provides definitions for the purpose of this part.

#### *Section 920.101 Definitions*

This section contains definitions necessary for the administration of this part.

Several organizations commented that OPM's proposed definition of "conditional offer"—defined as "an offer of employment in the civil service that is conditioned upon the results of a criminal history inquiry"—does not provide that a conditional offer can be revoked for reasons other than a criminal history inquiry, and that therefore OPM should clarify that the criminal history inquiry should be isolated from other necessary background screening. OPM agrees that the proposed definition of "conditional offer" is too narrow, and is revising the definition in § 920.101 in this final rule to read as follows: "conditional offer means an offer of employment to a position in the civil service that is conditioned upon the results of a background investigation, including, as relevant here, the results of a criminal history inquiry."

These organizations also encouraged OPM to clarify in its regulations that a hiring agency must extend a conditional offer in writing before inquiring about criminal history record information. OPM declines to make changes in response to this comment. OPM believes that agencies already extend all conditional offers in writing and that such clarification is unnecessary. OPM will, however, consider whether to address this point in subsequent guidance.

OPM received a comment from one agency recommending that OPM add language to the definition of "applicant" in 920.101(a) that explicitly includes or excludes current Federal employees. OPM is not adopting this suggestion. An "applicant" is defined as a person who has applied to an agency under its procedures for accepting applications. OPM notes that an applicant may, at times, be a Federal employee. The definition of "applicant" in the rule encompasses any person who has applied to an agency under its procedures for accepting applications; therefore, further clarification is not necessary.

#### *Section 920.102 Positions Covered by Fair Chance Act Regulations*

Section 920.102 explains which positions are covered by this part and which positions may be excluded.

Several organizations asked for OPM to remove the open-ended possibility for case-by-case exceptions, arguing that the statute requires OPM to list within the regulation the additional positions to which the exception may apply. Therefore, they argued that the proposal to grant case-by-case exceptions is contrary to the statute. OPM is adopting this recommendation in this final rule. The final rule deletes the language in § 920.201(b)(3) from the notice of proposed rulemaking that indicated that OPM will continue to consider case-by-case exceptions for exempting positions from the Fair Chance Act criminal history inquiry requirements. Previously, agencies were permitted to make requests for exceptions to the timing of collection of criminal history information based upon a job-related need, and with appropriate supporting information, including, for example, for positions in which criminal history information is required to determine whether the applicant is eligible for further consideration for the position. OPM granted these requests, which will remain in effect.

During the public comment period, one agency asked OPM to consider positions that have contact with minors to be an exception to the proposed rule.

Another agency recommended that OPM exempt (1) Testing Designated Positions and positions requiring Certification Licensure or Registration from the Act based on the sensitive nature of duties for covered positions; and (2) positions that provide direct care to elderly and to individuals with physical, mental, and intellectual disabilities which impair their ability to manage their personal affairs. The comments do not provide sufficient information for OPM to determine that all such positions—above and beyond those that are already exempted by statute—should be exempted from the Fair Chance Act's requirement to delay criminal history information, and, at this time, OPM is not exempting any additional positions in this regulation. To the extent agencies believe that additional positions should be exempt from such requirements, agencies should alert OPM, which will carefully consider any input for the purpose of future rulemaking or guidance.

Several organizations also asked that OPM provide clarity to agencies regarding their legal responsibility to conduct individualized assessments and otherwise fairly consider applicants with criminal history records even after a conditional offer and in accordance with Title VII and EEOC requirements. OPM notes that these rules only pertain to the timing of inquiries into an applicant's criminal history, not to the substantive selection process for Federal employment. OPM does not believe it is necessary to modify the regulation in response to these comments, but OPM does note that agencies have an independent obligation to comply with Title VII and that nothing in this rule shall be read in derogation of any individual's rights under Title VII.

A commenter asked how this regulation relates to the Bond Amendment when hiring for sensitive positions. As is addressed in § 920.201(b), the prohibition for requesting criminal history information before a conditional job offer does not apply for positions that require a determination of eligibility for access to classified information or which have been designated as a sensitive position under the Position Designation System issued by OPM and the Office of the Director of National Intelligence. Therefore, these changes have no effect on the requirements of the Bond Amendment.

### **Subpart B—Timing of Inquiries Regarding Criminal History**

Subpart B addresses when inquiries into an applicant's criminal history may be made.

#### *Section 920.201 Limitations on Criminal History Inquiries*

Section 920.201 describes the agency personnel who are covered by the prohibition of criminal history inquiries at certain points in the recruitment and hiring process, as well as the restrictions on when criminal history inquiries may be made and the exceptions for this limitation. This section also establishes notification requirements of the prohibition to applicants.

Several organizations asked that additional instructions be provided to hiring agencies about what actions must be delayed until after a conditional offer and how staff should respond if criminal history information is disclosed before a conditional offer. These organizations also commented that agencies should be directed, within the regulation, to not consider criminal history information that may be inadvertently disclosed earlier in the process or gained through informal attempts, such as through internet searches. OPM believes that part 920 clearly and with significant detail outlines the applicability of the limitations in terms of the means through which agencies may obtain information of this nature and the timing of which they may employ such means. Furthermore, this section requires agencies to publicize this prohibition, when applicable, within the job announcement, giving applicants the opportunity to know that the information is not to be requested ahead of the job offer. Therefore, OPM will not make any changes in this regulation based on these comments; OPM will, however, provide further instructions to agencies on these points in supplemental guidance.

#### *Section 920.202 Violations*

This section defines what constitutes a violation of the Fair Chance Act and the prohibition in section 920.201.

In the above sections, OPM has addressed the comments received related to section 920.202.

### **Expected Impact of This Final Rule**

#### *A. Statement of Need*

OPM is issuing this final rule to implement the provisions of the Fair Chance Act found in chapter 92 of title 5, United States Code. This statute prohibits Federal agencies and Federal contractors acting on their behalf from requesting that applicants for employment disclose criminal history record information before the agency makes a conditional offer of employment to that employee. The Fair Chance Act identifies some positions to

which the prohibition shall not apply and requires OPM to issue regulations identifying additional positions to which the prohibition shall not apply. It also requires OPM to establish complaint procedures under which an applicant for a position in the civil service may submit a complaint, or any other information, relating to compliance by an employee of an agency with the Fair Chance Act, and adverse action and appeal procedures when it has been determined that a Federal employee has violated the Fair Chance Act. OPM is implementing these statutory requirements in the least burdensome way it can while still effectuating the Fair Chance Act.

#### *B. Impact*

The final rule allows job applicants to present their qualifications and abilities for assessment and be considered based on their merits without the specter of a criminal history record during the selection process. Various studies show that offenders who maintain steady employment are less likely to become involved in criminal behavior after release from prison.<sup>1</sup> Although several factors may impact recidivism (such as family ties, and mental and physical health), it is widely held that stable employment supports relationship and financial goals that decrease the likelihood of re-offending.<sup>2</sup> As the nation's largest employer and a model employer, through this rule the Federal government will demonstrate an example of fair hiring practices by removing unnecessary barriers for people with records who desire to join the Federal workforce. Given that people with criminal history records are statistically less likely to quit,<sup>3</sup> Federal employers stand to save in turnover costs. For example, in a 2021 study, the Society for Human Resources Management found that 73% of business leaders and human resources professionals said workers with criminal records were just as or more dependable than workers without criminal records.<sup>4</sup> Not only does employment of formerly incarcerated

<sup>1</sup> Berg, & Huebner, "Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism" (April 28, 2011).

<sup>2</sup> Link, Ward, & Stansfield, "Consequences of Mental and Physical Health for Reentry and Recidivism: Toward a Health-based Model of Desistance" (March 27, 2019).

<sup>3</sup> Lee-Johnson, "Give Job Applicants with Criminal Records a Fair Chance" (September 21, 2020), and Society for Human Resources Management, "2021 Getting Talent Back to Work Report" (May 2021).

<sup>4</sup> Society for Human Resources Management, "2021 Getting Talent Back to Work Report" (May 2021).

individuals affect rates of recidivism, it benefits communities and society by reducing criminal justice costs, crime victimization costs, and the costs of incarceration to the reoffenders and their families.<sup>5</sup>

OPM believes there is significant value in being able to demonstrate the effect of these final regulations on both Federal agencies and formerly incarcerated individuals. As noted earlier, however, OPM currently does not have and is not aware of any data to show what impact, if any, OPM's existing "Ban the Box" rules have had on agency hiring processes. Therefore, OPM invited comments regarding any hiring data agencies may have that demonstrate the effect of either OPM's prior regulations or the potential impact of these proposed rules. This included ways that the proposed rules may impact the size of applicant pools for positions not previously covered by OPM's regulation, including positions in the excepted service as well as positions in the U.S. Postal Service and the Postal Regulatory Commission.

Several organizations commented with recommendations for the data that OPM should collect. Those recommendations include the following:

- Number of applicants provided a conditional offer (and number of those with a conviction record)
- Number of applicants with a conviction record whose conditional offers were rescinded by the hiring agency
- The convictions (offense and years elapsed) based upon which conditional offers were rescinded
- Number of applicants with a conviction record who were hired and the positions into which they were hired
- Demographic information for all of these categories

OPM appreciates these public comments and will take these recommendations into account as it formulates a data strategy including in consultation with other agency partners.

### C. Regulatory Alternatives

OPM's implementing regulations are required by statute and cannot be avoided. In the final regulations for part 754, OPM fleshes out procedures for receiving and investigating complaints, or any other information, as well as procedural and appeal rights for an agency employee alleged to have violated section 9202. The statute establishes the agencies and employees

covered by 5 CFR 754, available penalties that can be imposed for an employee found to have violated section 9202, and the 30-day timeframe for appealing an adverse action.

First, OPM considered the option of receiving complaints, and any other information, directly from applicants and conducting its own outreach and investigative fact-finding, as appropriate to the nature of the applicant's submission. But agencies have already established internal procedures for receipt and investigation of employment-related complaints against the agency and to accomplish these tasks in a fair and impartial manner. Therefore, we have laid out an approach that we believe is minimally burdensome for agencies and straightforward for applicants. Subject to OPM guidelines and oversight, the final rule assigns to each agency covered by the Fair Chance Act regulations the responsibility to receive complaints, or any other information, and any applicable supporting material. Further, this final rule delegates to each agency OPM's responsibility to conduct an investigation of the complaint, or any other information, regarding compliance with 5 U.S.C. 9202. OPM believes that establishing a process that is similar to other successful and effective processes will facilitate implementation of the Fair Chance Act complaint process in covered agencies as agencies are already familiar with these similar processes. While the final rule provides parameters to guide agencies and facilitate governmentwide consistency, the assignment and delegation to agencies reduces the need for what would be more extensive regulations if OPM were directly receiving and investigating complaints, and other information, related to an alleged violation of section 9202.

Regarding the procedures for adverse actions, the statute requires notice and an opportunity for a hearing on the record by OPM for any employee alleged to have committed a violation of section 9202. Section 9205 further notes that the procedures of chapter 75 of title 5, United States Code, are not applicable and that appeal or judicial review are not applicable except as provided under procedures established by the Director of OPM. Because chapter 75 procedures are not available, the final rule establishes an alternative to implement the unique procedural and appeal elements of the Fair Chance Act. In developing the procedures, OPM considered the benefits of adapting the adverse action procedures found at 5 CFR part 752 rather than another approach. Adapting the part 752

procedures affords agencies the benefit of familiarity, facilitates ease of transfer in knowledge and skills to the new regulations, and reduces the need for more extensive or complex regulations.

### D. Costs

OPM did not receive any comments on the estimated costs in the proposed rule. The economic assessment is finalized with no changes.

#### Costs Related to Parts 302, 317, 319, 330, 731, and 920—Restrictions on Preemployment Criminal History Inquiries Prior to Conditional Offer

This rule will affect the operations of over 80 Federal agencies ranging from cabinet-level departments to small independent agencies. This rule expands the prohibition on making inquiries into an applicant's criminal background prior to a conditional offer of employment. The prohibition currently applies to positions in the competitive service. This final rule will expand this prohibition to include agencies with positions in the excepted service and the Senior Executive Service. There are approximately 20 agencies in the Executive Branch that are fully in the excepted service that will be impacted by this final rule. We estimate that this rule will require individuals employed by these agencies to develop policies and procedures to implement the rule when making appointments. For the purpose of this cost analysis, with regard to parts 302, 317, 319, 330, 731, and 920, the assumed average salary rate of Federal employees performing this work will be the rate in 2022 for GS-14, step 5, from the Washington, DC, locality pay table (\$143,064 annual locality rate and \$68.55 hourly locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of \$137.10 per hour.

In order to comply with the regulatory changes in this final rule, affected agencies will need to review the rule and update their policies and procedures. We estimate that, in the first year following publication of the final rule, this will require an average of 250 hours of work by employees with an average hourly cost of \$137.10. This would result in estimated costs in that first year of implementation of about \$34,275 per agency, and about \$2,742,000 in total governmentwide. We do not believe this rule will substantially increase the ongoing administrative costs to agencies (including the administrative costs of administering the program and hiring

<sup>5</sup> U.S. Department of Labor, "Reducing Recidivism and Increasing Opportunity" (June 2018).

and training new staff) as this rule sets out leveraging existing procedures.

#### Costs Related to Part 754—Complaint Procedures, Adverse Actions, and Appeals for Criminal History Inquiries Prior to Conditional Offer

Regarding the implementation of the regulatory requirements in part 754, in the event of a complaint by an applicant, agencies will incur labor costs associated with the investigation into the complaint. OPM will incur labor costs associated with reviewing the results of the investigation and reaching a determination, which could include issuing a notice of proposed action to the subject of the complaint, considering any response, and making a final determination. In the event OPM directs the employing agency to take an action as a result of a founded complaint, OPM would incur labor costs in responding to and/or defending any appeal by the subject of the complaint to the Merit Systems Protection Board (MSPB).

In order to estimate the costs to implement the final regulatory requirements in part 754 for complaint procedures, adverse actions, and appeals, OPM made certain assumptions and considered that some costs may vary depending on agency size and the extent to which an agency is able to leverage existing policies, practices, and procedures. For this cost analysis, the assumed staffing for Federal employees performing the work required by the regulations in part 754 is one executive; one GS-14, step 5; a GS-15, step 5; and one GS-7, step 5 in the Washington, DC, locality area. The 2022 basic rate of pay for an executive at an agency with a certified SES performance appraisal system ranges from \$135,468 to \$203,700 annually, for an average of \$169,584 per year or \$81.26 per hour. For General Schedule employees in the Washington, DC, locality area, the 2022 pay table rates are \$168,282 annually and \$80.63 hourly for GS-15, step 5; \$143,064 annually and \$68.55 for GS-14, step 5, and \$57,393 annually and \$27.50 hourly for GS-7, step 5. We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in assumed hourly labor costs of \$162.51 for an executive; \$161.27 for a GS-15, step 5; \$137.10 for a GS-14, step 5; and \$55 for a GS-7, step 5.

As to overall complaint procedures, program implementation and oversight, OPM assumes it will incur certain upfront costs and then ongoing costs. For example, the establishment of new processing codes requires one-time

updates to OPM's databases and personnel action processing handbook. After the issuance of any final rule effecting part 754, OPM may develop additional materials related to its implementation. This includes, but is not limited to, procedures and guidance related to agency obligations to report to OPM actions taken to investigate any complaints filed by an applicant regarding an agency's compliance with 5 U.S.C. 9202 and adverse actions taken at the direction of OPM for non-compliance with 5 U.S.C. 9202. OPM estimates that the cost for its implementation and oversight in the first year will be \$30,370.00 and \$3,687.04 on average in subsequent years.

OPM estimates that it will cost each agency \$21,319.04 in the first year to establish an internal policy for handling alleged violations of 5 U.S.C. 9202. We assume that larger agencies advertise more vacancies and are therefore likely to receive a greater number of complaints. We estimate the annual cost of complaint intake and investigation for large agencies to be \$172,746.00 (based on an average of 30 complaints per large agency); medium size agencies \$115,164.00 (for 20 complaints); and small size agencies \$57,582.00 (for 10 complaints). The total estimated cost for agencies to receive and investigate complaints is \$345,492.00 annually, which averages to \$5,758.20 per complaint.

For agency outreach regarding any other information that may potentially be an attempt to file a complaint for an alleged violation of 5 U.S.C. 9202, OPM again assumes that larger agencies advertise more vacancies and are therefore likely to experience a greater number of such instances. We estimate that large agencies on average may conduct 30 instances of outreach and incur \$8,226.00 for the total number of instances. Medium size agencies may conduct outreach for 20 instances and incur \$5,484.00 total. Small agencies may conduct outreach for 10 instances and incur \$2,742.00 total. The total estimated annual cost of agency outreach is \$16,452.00 and the average cost of agency outreach is \$274.20 per instance.

Following agency intake, outreach (if applicable), and investigation, OPM is responsible for administering the adverse action procedures as outlined in § 754.203. Based on the estimate for the annual number of complaints that Federal agencies may receive (60 for large, medium, and small agencies combined), OPM estimates that 25%, or 15, of the complaints may result in a finding of a violation of 5 U.S.C. 9202.

While OPM will carefully review and consider each investigative file submitted by agencies, OPM expects that only those investigations that result in a finding of a violation will generate a meaningful increase in cost above staff's usual duties and responsibilities. Assuming 15 such cases, the total cost for OPM's administration of the adverse action procedures, including proposing an action, considering any reply, and issuing a decision, is estimated to be \$159,818.40. The average cost for OPM per adverse action is \$10,654.56.

Under this final regulation, agencies are responsible for processing any adverse action imposed by OPM. Agencies routinely process suspensions for other forms of misconduct. Thus, applying those same procedures to adverse actions imposed for violations of 5 U.S.C. 9202 will be a negligible cost for agencies as they will be leveraging existing processes and procedures. However, OPM does anticipate some cost for the one-time update to agency processing systems for the new codes established by OPM to identify that the adverse actions are taken under 5 U.S.C. 9202, as well as the establishment of agency procedures for the collection of civil penalties. OPM estimates the costs to agencies in the first year for updating their systems and procedures and processing actions to be \$24,690.04. Thereafter, we estimate that the average cost for an agency to process an adverse action, including any civil penalty, is \$960.50 per action.

The available penalties for violations of 5 U.S.C. 9202 include written warnings and short suspensions (14 days or less) that are not grievable or appealable. Further, an employee's first two violations of section 9202 will result in a penalty no stronger than a seven-day suspension. For only a third or subsequent violation would OPM impose a penalty that may be appealable to the MSPB. While such an appeal to the MSPB is possible, we believe that it will be rare that an employee violates section 9202 three or more times. OPM anticipates that if 15 adverse actions are imposed per year, OPM anticipates that only one on average will be appealable to the MSPB. We therefore do not believe there will be a measurable impact on MSPB operations and thus, we have not estimated costs for the MSPB.

Because any appeal filed is against OPM and not the employing agency, OPM will be responsible for defending the action. OPM estimates \$11,447.84 to defend an appeal.

The remaining requirements of part 754 for complaint procedures, adverse actions, and appeals will require

minimal costs for OPM or agencies, or only negligible costs. With respect to informing applicants of the agency's complaint procedures via the agency's public website and in vacancy announcements, the additional cost to agencies will be small. Agencies already provide notice on their public websites and in vacancy announcements about how an applicant can file an EEO complaint. Also, agencies provide information to the public on their external websites about how to file an Inspector General complaint. Thus, an additional notice does not present a significant additional cost. In conclusion, OPM estimates a cost of \$598,141.47 to implement the complaint procedures under the final Fair Chance Act regulations in the first year and the recurring cost per year to be \$32,782.34.

**Indirect Costs**

We note that the final rule may have indirect costs on other entities. Section 1122(d) of the Fair Chance Act amends section 207(d)(2) of the Congressional Accountability Act of 1995 to require the Board of Directors of the Office of Congressional Workplace Rights to promulgate regulations that are "the same" as OPM's "except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section." Section 1122(e) of the Fair Chance Act similarly amends 28 U.S.C. 604(e)(5)(B) to require the Director of the Administrative Office of the U.S. Courts to promulgate regulations that are "the same" as OPM's "except to the extent that the Director . . . may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this subsection." Finally, section 1123(c) of the Fair Chance Act requires the Federal Acquisition Regulation (FAR) Council to amend the FAR "to be consistent with" OPM's regulations "to the maximum extent practicable" and to "include together with such revision an explanation of any substantive modification of the Office of Personnel Management regulations, including an explanation of how such modification will more effectively implement the rights and protections under this section." Such indirect costs are not quantifiable since sections 1122(d)-(e) and 1123(c) of the Fair Chance Act give the other entities significant leeway to adopt, reject, or modify OPM's

regulations with respect to the populations covered by those sections.

#### E. Benefits

This final regulation provides the opportunity for a qualified applicant with a criminal history record to advance in the hiring process just as a qualified applicant without a criminal history record would advance. The regulation benefit not only the Federal government as an employer but also American society as a whole at the family and community levels in terms of a strengthened economy.

This final regulation will support the Administration's priority to advance comprehensive equity. The final rule can help Federal agencies realize the vision of the Federal government as a model employer and to advance the principles of diversity, equity, inclusion, and accessibility. Finally, another benefit of this rule is increased transparency and accountability in the Federal hiring process. The regulations provide applicants who believe they have been subjected to a violation of 5 U.S.C. 9202 the right to report the alleged violation and holds accountable Federal employees found to have committed such a violation.

#### F. Request for Comment and Data

In addition to the questions posed in the regulatory analysis and given the limited information on the Federal Government's implementation on Ban the Box, OPM requested comment on the implementation and impacts of Ban the Box efforts in the private sectors. As noted above, OPM received multiple responses regarding the data that OPM should collect to inform the impact of this effort. OPM appreciates the responses received and is formulating a strategy for future data collections.

#### G. List of Sources

- Berg, Mark T. & Huebner, Beth M. "Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism." *Justice Quarterly*, April 28, 2011, 382. <https://doi.org/10.1080/07418825.2010.498383>
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- Link, Nathan W., Ward, Jeffrey T., & Stansfield, Richard. "Consequences of Mental and Physical Health for Reentry and Recidivism: Toward a Health-based Model of Desistance." *Criminology*, March 27, 2019, 544. <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1745-9125.12213>
- National Employment Law Project. "FAQ: Fair Chance to Compete for Jobs Act of

2019," December 2019. <https://s27147.pcdn.co/wp-content/uploads/Fact-Sheet-FAQ-Federal-Fair-Chance-Compete-Jobs-Act-2019.pdf>

- Society for Human Resources Management. "2021 Getting Talent Back to Work Report: A Workplace Survey on Hiring and Working with People with Criminal Records," May 2021. [https://www.gettingtalentbacktowork.org/wp-content/uploads/2021/05/2021-GTBTW\\_Report.pdf](https://www.gettingtalentbacktowork.org/wp-content/uploads/2021/05/2021-GTBTW_Report.pdf)
- U.S. Department of Labor. "Reducing Recidivism and Increasing Opportunity: Benefits and Costs of the RecycleForce Enhanced Transitional Jobs Program," June 2018. [https://www.mdrc.org/sites/default/files/ETJD\\_STED\\_Benefit\\_Cost\\_Technical\\_Supplement\\_508.pdf](https://www.mdrc.org/sites/default/files/ETJD_STED_Benefit_Cost_Technical_Supplement_508.pdf)

#### Executive Orders 13563 and 12866, Regulatory Review

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. In accordance with the provisions of Executive Order 12866, this rule was reviewed by the Office of Management and Budget as significant.

#### Regulatory Flexibility Act

The OPM Director certifies that this rule will not have a significant economic impact on a substantial number of small entities because it applies only to Federal agencies and employees.

#### E.O. 13132, Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

#### E.O. 12988, Civil Justice Reform

This regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local or Tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

**Congressional Review Act**

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act or CRA) (5 U.S.C. 801 *et seq.*) requires rules to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this rule before its effective date, as required by 5 U.S.C. 801. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this rule is not a major rule as defined by the CRA (5 U.S.C. 804).

**Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521)**

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule makes reference to an OMB approved collection of information subject to the PRA titled *Declaration for Federal Employment (OF 306)*, OMB Control Number 3206–0182. The systems of record notice for this collection is <https://www.opm.gov/information-management/privacy-policy/sorn/opm-sorn-govt-1-general-personnel-records.pdf>.

OPM requested comments as part of the proposed rule on this information collection. While no comments were received on the burden or cost estimate, OPM did receive other comments. In response to comments regarding the timing of asking applicants about criminal history, OPM is replacing a sentence in the instructions to add clarity to the timing within the process when an individual is most likely to be asked to complete the form (*i.e.*, after a tentative job offer has been made). Should an individual need to fill out an OF 306, it can be done in several ways such as through USAStaffing, in response to an email from the hiring agency, or through other electronic means.

**List of Subjects in 5 CFR Part 302, 317, 319, 330, 731, 754, and 920**

Administrative practice and procedure, Government employees.

Office of Personnel Management.

**Kayyonne Marston,**

*Federal Register Liaison.*

Accordingly, for the reasons stated in the preamble, OPM amends chapter I of title 5, Code of Federal Regulations, as follows:

**PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE**

- 1. Revise the authority citation for part 302 to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, 3302, 3317, 3318, 3319, 3320, 8151, E.O. 10577 (3 CFR 1954–1958 Comp., p. 218); § 302.105 also issued under 5 U.S.C. 1104, Pub. L. 95–454, sec. 3(5); § 302.501 also issued under 5 U.S.C. 7701 *et seq.*; § 302.107 also issued under 5 U.S.C. 9201–9206 and Pub. L. 116–92, sec. 1122(b)(1).

- 2. Add § 302.107 to subpart A to read as follows:

**§ 302.107 Suitability inquiries regarding criminal history.**

Agency inquiries regarding criminal history must be done in accordance with the requirements under chapter 92 of title 5, U.S. Code and part 920 of this chapter.

**PART 317—EMPLOYMENT IN THE SENIOR EXECUTIVE SERVICE**

- 3. Revise the authority citation for part 317 to read as follows:

**Authority:** 5 U.S.C. 3392, 3393, 3395, 3397, 3592, 3593, 3595, 3596, 8414, AND 8421. § 317.202 also issued under 5 U.S.C. 9201–9206 and Pub. L. 116–92, sec. 1122(b)(1).

- 4. Add § 317.202 to subpart B to read as follows:

**§ 317.202 Suitability inquiries regarding criminal history.**

Agency inquiries regarding criminal history must be done in accordance with the requirements under chapter 92 of title 5, U.S. Code and part 920 of this chapter.

**PART 319—EMPLOYMENT IN THE SENIOR-LEVEL AND SCIENTIFIC AND PROFESSIONAL POSITIONS**

- 5. Revise the authority citation for part 319 to read as follows:

**Authority:** 5 U.S.C. 1104, 3104, 3324, 3325, 5108, AND 5376. § 319.106 also issued under 5 U.S.C. 9201–9206 and Pub. L. 116–92, sec. 1122(b)(1).

- 6. Add § 319.106 to subpart A to read as follows:

**§ 319.106 Suitability inquiries regarding criminal history.**

Agency inquiries regarding criminal history must be done in accordance with the requirements under chapter 92 of title 5, U.S. Code and part 920 of this chapter.

**PART 330—RECRUITMENT, SELECTION, AND PLACEMENT (GENERAL)**

- 7. Revise the authority citation for part 330 to read as follows:

**Authority:** 5 U.S.C. 1104, 1302, 3301, 3302, 3304, and 3330; E.O. 10577, 3 CFR, 1954–58 Comp., p. 218; Section 330.103 also issued under 5 U.S.C. 3327; Subpart B also issued under 5 U.S.C. 3315 and 8151; Section 330.401 also issued under 5 U.S.C. 3310; Subparts F and G also issued under Presidential Memorandum on Career Transition Assistance for Federal Employees, September 12, 1995; Subpart G also issued under 5 U.S.C. 8337(h) and 8456(b). § 330.1301 also issued under 5 U.S.C. 9201–9206 and Pub. L. 116–92, sec. 1122(b)(1).

- 8. Revise subpart M, consisting of §§ 330.1300 and 330.1301, to read as follows:

**Subpart M—Timing of Background Investigations****§ 330.1300 Timing of suitability inquiries in competitive hiring.**

(a) A hiring agency may not make specific inquiries concerning an applicant's credit background of the sort asked on the OF–306, Declaration for Federal Employment, or other forms used to conduct suitability investigations for Federal employment (*i.e.*, inquiries into an applicant's adverse credit history) unless the hiring agency has made a conditional offer of employment to the applicant. Agencies may make inquiries into an applicant's Selective Service registration, military service, citizenship status, where applicable, or previous work history, prior to making a conditional offer of employment to an applicant.

(b) However, in certain situations, agencies may have a business need to obtain information about the credit background of applicants earlier in the hiring process to determine if they meet the qualifications requirements or are suitable for the position being filled. If so, agencies must request an exception from the Office of Personnel Management in order to determine an applicant's ability to meet qualifications or suitability for Federal employment prior to making a conditional offer of employment to the applicant(s). OPM will grant exceptions only when the agency demonstrates specific job-related reasons why the agency needs to

evaluate an applicant's adverse credit history earlier in the process. OPM will consider such factors as, but not limited to, the nature of the position being filled and whether a clean credit history record would be essential to the ability to perform one of the duties of the position effectively. OPM may also consider positions for which the expense of completing the examination makes it appropriate to review an applicant's credit background at the outset of the process (e.g., a position that requires that an applicant complete a rigorous training regimen and pass an examination based upon the training before the applicant's selection can be finalized). A hiring agency must request and receive an OPM-approved exception prior to issuing public notice for a position for which the agency will collect credit background information prior to completion of the assessment process and the making of a conditional offer of employment.

**§ 330.1301 Suitability inquiries regarding criminal history.**

Agency inquiries regarding criminal history must be done in accordance with the requirements under chapter 92 of title 5, U.S. Code and part 920 of this chapter.

**PART 731—SUITABILITY**

■ 9. Revise the authority citation for part 731 to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, 7301, 9201–9206; Pub. L. 116–92, sec. 1122(b)(1); E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218, as amended; E.O. 13467, 3 CFR, 2009 Comp., p. 198; E.O. 13488, 3 CFR, 2010 Comp., p. 189; 5 CFR, parts 1, 2 and 5; Presidential Memorandum on Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulty Through No Fault of Their Own, January 31, 2014.

■ 11. In § 731.103, revise paragraph (d)(1) to read as follows:

**§ 731.103 Delegation to agencies.**

\* \* \* \* \*

(d) \* \* \*  
(1) A hiring agency may not make specific inquiries concerning an applicant's criminal or credit background in oral or written form (including through the OF–306 or other forms used to conduct suitability investigations for Federal employment, USAJOBS, or any other electronic means) unless the hiring agency has made a conditional offer of employment to the applicant. Agencies may request an exception to the provision for making credit inquiries in advance of a conditional offer in accordance with the

provisions in 5 CFR part 330, subpart M. For criminal inquiries prior to a conditional offer, this prohibition does not apply to applicants for positions excepted under 5 CFR 920.201(b). Agencies may make inquiries into an applicant's Selective Service registration, military service, citizenship status, where applicable, or previous work history, prior to making a conditional offer of employment to an applicant.

\* \* \* \* \*

■ 12. Add part 754 as follows:

**PART 754—COMPLAINT PROCEDURES, ADVERSE ACTIONS, AND APPEALS FOR CRIMINAL HISTORY INQUIRIES PRIOR TO CONDITIONAL OFFER**

**Subpart A—Complaint Procedures**

- Sec.
- 754.101 Coverage.
- 754.102 Agency complaint process.
- 754.103 Applicant representatives.

**Subpart B—Adverse Actions**

- 754.201 Coverage.
- 754.202 Penalty determination.
- 754.203 Procedures.
- 754.204 Appeal rights.
- 754.205 Agency records.

**Authority:** 5 U.S.C. 554(a)(2), 1103(a)(5)(A), 1104(a)(2), 9201–9205, and Pub. L. 116–92, sec. 1122(b)(1).

**Subpart A—Complaint Procedures**

**§ 754.101 Coverage.**

(a) *Actions covered.* A complaint, or any other information, submitted by an applicant for an appointment to a civil service position relating to compliance with section 9202 of title 5, United States Code.

(b) *Definitions.* In this subpart, *Agency, applicant, appointing authority, conditional offer, criminal history record information, and employee* have the meanings set forth in 5 CFR 920.101.

**§ 754.102 Agency complaint process.**

(a) *Complaint intake.* (1) Within 90 days of the effective date of this part, each agency must establish and publicize an accessible program for the agency to receive a complaint, or any other information, from an applicant, and any applicable supporting material, relating to the agency's compliance with section 9202 of title 5, United States Code and part 920 of this chapter, in accordance with the guidelines and standards established in this section and the issuances described in paragraph (d)(3) of this section.

(2) An applicant may submit a complaint, or any other information, to

an agency within 30 calendar days of the date of the alleged non-compliance by an employee of an agency with section 9202 of title 5, United States Code and part 920 of this chapter.

(3) The agency shall extend the 30-calendar-day time limit in paragraph (a)(2) of this section when the applicant shows that the applicant was not notified of the time limits and was not otherwise aware of them, that the applicant did not know and reasonably should not have known that the non-compliance with 5 U.S.C. 9202 and part 920 of this chapter occurred, to consider a reasonable accommodation of a disability, or for other proper and adequate reasons considered by the agency.

(4) The agency must conduct outreach to inform an applicant of the procedure for submitting a complaint when it has reasonable cause to believe that the applicant is attempting to file a complaint.

(b) *Agency investigation.* (1) Acting under delegated authority from OPM and subject to the limitations and requirements of paragraph (d) of this section, the agency employing the employee against whom the complaint has been filed shall investigate the complaint, unless the employee is an administrative law judge appointed under 5 U.S.C. 3105. To carry out this function in an impartial manner, the same agency official(s) responsible for executing and advising on the recruitment action may not also be responsible for managing, advising, or overseeing the agency complaint process established in this section.

(2) In carrying out its delegated responsibilities under paragraph (b)(1) of this section, the agency shall develop an impartial and appropriate factual record adequate for OPM to make findings on the claims raised by any written complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether non-compliance with 5 U.S.C. 9202 and part 920 of this chapter occurred. Agencies have discretion to determine the appropriate fact-finding methods that efficiently and thoroughly address the matters at issue.

(3) The agency must delegate to the investigator sufficient authority to secure the production, from agency employees and contractors, of documentary and testimonial evidence needed to investigate and report on the complaint.

(4) The applicant or applicant's representative must be given a reasonable time to respond to a request for documentary and testimonial

evidence. This time period will not exceed 10 calendar days under ordinary circumstances. However, in the agency's discretion, an agency may grant an extension under extenuating circumstances.

(5) The agency shall complete its investigation within 60 calendar days of the date of the filing of the complaint. An agency may extend the investigation period when the agency has provided more than 10 calendar days for the applicant to respond to a request for documentary and testimonial evidence pursuant to paragraph (b)(4) of this section. Notwithstanding an extension, the agency shall complete the investigation as expeditiously as possible.

(6) Within 30 calendar days of completing its investigation, the agency shall provide to OPM an administrative report. This report should include the applicant's complaint, or any other information submitted by the applicant, the agency's factual findings, a complete copy of all information gathered during the investigation, and any other information that the agency believes OPM should consider. The report should be submitted to the Manager, Employee Accountability, Accountability and Workforce Relations, Employee Services, Office of Personnel Management, 1900 E Street NW, Room 7H28, Washington, DC 20415 or [employeeaccountability@opm.gov](mailto:employeeaccountability@opm.gov).

(c) *OPM adjudication.* (1) At OPM's discretion, OPM may request the agency provide additional information as necessary.

(2) OPM shall notify the agency and the subject(s) of the complaint in writing of its assessment of the complaint, including any decision to initiate adverse action proceedings under subpart B of this part.

(d) *OPM oversight.* (1) OPM may revoke an agency's delegation under this section if an agency fails to conform to this section or OPM issuances as described in paragraph (d)(3) of this section.

(2) OPM retains jurisdiction to make final determinations and take actions regarding the receipt and investigation of complaints, or any other information; record-keeping; and reporting related to an allegation of non-compliance with 5 U.S.C. 9202 and part 920 of this chapter. Paragraphs (a) and (b) of this section notwithstanding, OPM may, in its discretion, exercise its jurisdiction under this section in any case it deems necessary.

(3) OPM may set forth policies, procedures, standards, and supplementary guidance for the

implementation of this section in OPM issuances.

#### **§ 754.103 Applicant representatives.**

An applicant may select a representative of the applicant's choice to assist the applicant during the complaint process. An agency may disallow as an applicant's representative an individual whose activities as a representative would cause a conflict of interest or position; an agency employee who cannot be released from official duties because of the priority needs of the Government; or an agency employee whose release would give rise to unreasonable costs to the Government.

### **Subpart B—Adverse Actions**

#### **§ 754.201 Coverage.**

(a) *Actions covered.* This subpart applies to actions taken under 5 U.S.C. 9204.

(b) *Employees covered.* This subpart covers an employee of an agency as defined and "employee" has the meaning given the term in 5 CFR 920.101.

(c) *Definitions.* In this subpart—

*Civil penalty* means a monetary penalty imposed on an employee of a covered agency when it has been determined the employee has violated the Fair Chance Act.

*Day* means a calendar day.

*Director* means the Director of OPM or Director's designee.

*Suspension* means the placing of an employee of a covered agency in a temporary status without duties and pay when it has been determined the employee violated the Fair Chance Act.

#### **§ 754.202 Penalty determination.**

(a) *First violation.* If the Director or Director's designee determines, after OPM provides the procedural rights in § 754.203, that an employee of an agency has violated 5 U.S.C. 9202 and part 920 of this chapter, the Director or Director's designee shall issue to the employee a written warning that includes a description of the violation and the additional penalties that may apply for subsequent violations; and direct the agency to file such warning in the employee's official personnel record file.

(b) *Subsequent violations.* If the Director or Director's designee determines, after OPM provides the procedural rights in § 754.203, that an employee of an agency has committed a subsequent violation of 5 U.S.C. 9202 and part 920 of this chapter, the Director or Director's designee may take the following action:

(1) For a second violation, order a suspension of the employee for a period of not more than 7 days.

(2) For a third violation, order a suspension of the employee for a period of more than 7 days.

(3) For a fourth violation—

(i) Order a suspension of the employee for a period of more than 7 days; and

(ii) Order the employee's agency to collect a civil penalty against the employee in an amount that is not more than \$250, and remit the penalty amount to the U.S. Department of Treasury for deposit in the Treasury.

(4) For a fifth violation—

(i) Order a suspension of the employee for a period of more than 7 days; and

(ii) Order the employee's agency to collect a civil penalty against the employee in an amount that is not more than \$500, and remit the penalty amount to the U.S. Department of Treasury for deposit in the Treasury.

(5) For any subsequent violation—

(i) Order a suspension of the employee for a period of more than 7 days; and

(ii) Order the employee's agency to collect a civil penalty against the employee in an amount that is not more than \$1,000, and remit the penalty amount to the U.S. Department of Treasury for deposit in the Treasury.

(c) *Duration of suspension and penalty amount.* The Director or Director's Designee has discretion to determine the duration of a suspension and the amount of a penalty under this section, subject only to the minimum and maximum durations and amounts specified in this section.

(d) *Agency responsibilities.* An agency shall carry out an order of the Director to suspend an employee, or to collect and remit a civil penalty, pursuant to processing and recordkeeping instructions issued by OPM.

(1) The agency shall carry out the order of the Director to suspend the employee as soon as practicable.

(2) The agency shall carry out the order of the Director to collect and remit a civil penalty as soon as practicable, unless the employee timely appeals the action under § 754.204, in which case the agency shall collect and remit the civil penalty as soon as practicable after the Merit Systems Protection Board issues a final decision sustaining the action.

(e) *Administrative law judges.* Paragraphs (a) through (d) of this section do not apply if the Director or Director's designee believes that an administrative law judge has violated 5 U.S.C. 9202 and part 920 of this chapter. In any such

case the Director or Director's designee shall file a complaint with the Merit Systems Protection Board proposing an action set forth in 5 U.S.C. 9204 and describing with particularity the facts that support the proposed agency action, and the Board will determine whether the action is for good cause under its regulations in 5 CFR part 1201, subpart D.

#### § 754.203 Procedures.

(a) *Notice of proposed action.* An employee against whom action is proposed under this subpart is entitled to at least 30 days' advance written notice. The notice must state the specific reason(s) for the proposed action and inform the employee of the right to review the material which is relied on to support the reasons for the proposed action given in the notice before any final decision is made by the Director or Director's designee.

(b) *Employee's answer.* (1) An employee may answer orally and in writing. The employee's agency must give the employee a reasonable amount of official time to review the material relied on to support OPM's proposed action, to prepare and present an answer orally and in writing, and to secure affidavits, if the employee is in an active duty status. OPM may require the employee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the employee's answer, within such time as would be reasonable, but not less than 7 days.

(2) The Director or Director's Designee may designate an Office of Personnel Management official to hear the employee's oral answer, and confer authority on that person to make or recommend a final decision on the proposed adverse action.

(c) *Representation.* An employee covered by this part is entitled to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of the agency whose release from the employee's official position would give rise to unreasonable costs or whose priority work assignments preclude release.

(d) *OPM decision.* (1) In arriving at a decision, the Director or Director's Designee will consider only the complaint, the applicant's supporting material, the agency's administrative file, the reasons specified in the notice of proposed action, and any oral and written answer by the employee or the employee's representative.

(2) The decision notice must specify in writing the reasons for the decision and advise the employee of any appeal rights.

(e) *Administrative Law Judges.* This section does not apply if the Director or Director's designee believes that an administrative law judge has violated 5 U.S.C. 9202 and part 920 of this chapter.

#### § 754.204 Appeal rights.

(a) An employee against whom an action is taken by OPM under § 754.203 may appeal to the Merit Systems Protection Board, under the regulations of the Board, but only to the extent the action concerns suspensions for more than 14 days or combines a suspension and a civil penalty. An appeal must be filed by not later than 30 days after the effective date of the action. The procedures for filing an appeal with the Board are found at 5 CFR part 1201.

(b) If the Board finds that one or more of the charges brought by OPM against the employee is supported by a preponderance of the evidence, regardless of whether all specifications are sustained, it must affirm OPM's action. The Board may neither review whether the adverse action is for such cause as will promote the efficiency of the service, nor mitigate the duration of a suspension or the amount of a civil penalty ordered under this part.

(c) An appeal against OPM is the exclusive avenue of appeal. The employee has no right to file a separate appeal against the employing agency for processing a personnel action as ordered by OPM under § 754.202.

(d) OPM's action under § 754.202 of this part is not subject to an agency's administrative grievance procedure or a negotiated grievance procedure under a collective bargaining agreement between an exclusive bargaining representative and any agency.

#### § 754.205 Agency records.

The complaint, the applicant's supporting material, the agency's administrative file, the notice of the proposed action, the employee's written reply, if any, summary or transcript of the employee's oral reply, if any, the notice of decision, and any order to the covered agency effecting the action together with any supporting material, must be maintained in the applicable Privacy Act system of records.

■ 13. Add part 920 to read as follows:

### PART 920—TIMING OF CRIMINAL HISTORY INQUIRIES

#### Subpart A—General Provisions

Sec.

920.101 Definitions.

920.102 Positions covered by Fair Chance Act regulations.

#### Subpart B—Timing of Inquiries Regarding Criminal History

920.201 Limitations on criminal history inquiries.

920.202 Violations.

**Authority:** 5 U.S.C. 1103(a)(5)(A), 9201–9206 and Pub. L. 116–92, sec. 1122(b)(1).

#### Subpart A—General Provisions

##### § 920.101 Definitions.

For the purpose of this part:

*Agency* means—

(1) An Executive agency as such term is defined in 5 U.S.C. 105, including—

(i) An Executive department defined in 5 U.S.C. 101;

(ii) A Government corporation defined in 5 U.S.C. 103(1); and

(iii) An independent establishment defined in 5 U.S.C. 104, including the Government Accountability Office;

(2) A military department as defined in 5 U.S.C. 102;

(3) The United States Postal Service and the Postal Regulatory Commission; and

(4) Each component of the Executive Office of the President that is an independent establishment, or that has a position in the competitive service, with respect to an applicant for the position.

*Applicant* means a person who has applied to an agency under its procedures for accepting applications consistent with governmentwide regulations, as applicable.

*Appointing authority* means an employee in the executive branch of the Government of the United States that has authority to make appointments to positions in the civil service.

*Conditional offer* means an offer of employment to a position in the civil service that is conditioned upon the results of a background investigation, including, as relevant here, the results of a criminal history inquiry.

*Criminal history record information*—

(1) Except as provided in paragraphs (2) and (3) of this definition, has the meaning given the term in section 9101(a) of title 5, United States Code;

(2) Includes any information described in the first sentence of section 9101(a)(2) of title 5, United States Code, that has been sealed or expunged pursuant to law; and

(3) Includes information collected by a criminal justice agency, relating to an act or alleged act of juvenile delinquency, that is analogous to criminal history record information (including such information that has been sealed or expunged pursuant to law).

*Employee* means an “employee” as defined in 5 U.S.C. 2105 and an employee of the United States Postal Service or the Postal Regulatory Commission.

*Political appointment* means an appointment by the President without Senate confirmation (except those appointed under 5 CFR 213.3102(c)); an appointment to a position compensated under the Executive Schedule (5 U.S.C. 5312 through 5316); an appointment of a White House Fellow to be assigned as an assistant to a top-level Federal officer (5 CFR 213.3102(z)); a Schedule C appointment (5 CFR 213.3301, 213.3302); a noncareer, limited term, or limited emergency Senior Executive Service appointment (5 CFR part 317, subpart F); an appointee to serve in a political capacity under agency-specific authority; and a provisional political appointment.

#### **§ 920.102 Positions covered by Fair Chance Act regulations.**

(a) *Positions covered.* This part applies to all positions in the competitive service, excepted service, and Senior Executive Service in an agency.

(b) *Exempt positions.* For purposes of this part an exempt position is any position for which a hiring agency is required by statutory authority to make inquiries into an applicant’s criminal history prior to extending an offer of employment to the applicant.

#### **Subpart B—Timing of Inquiries Regarding Criminal History**

##### **§ 920.201 Limitations on criminal history inquiries.**

(a) *Applicability.* An employee of an agency may not request, in oral or written form (including through the Declaration for Federal Employment (Office of Personnel Management Optional Form 306) or any similar successor form, the USAJOBS internet website, or any other electronic means) that an applicant for an appointment to a position in the civil service disclose criminal history record information regarding the applicant before the appointing authority extends a conditional offer to the applicant. This includes the following points in the recruitment and hiring process:

(1) Initial application, through a job opportunity announcement on USAJOBS, or through any recruitment/public notification such as on the agency’s website/social media, etc.;

(2) After an agency receives an initial application through its back-end system, through shared service providers/recruiters/contractors, or orally or via

email and other forms of electronic notification; and

(3) Prior to, during, or after a job interview. This prohibition applies to agency personnel, including when they act through shared service providers, contractors (acting on behalf of the agency) involved in the agency’s recruitment and hiring process, or automated systems (specific to the agency or governmentwide).

##### *(b) Exceptions for certain positions.*

(1) The prohibition under paragraph (a) of this section shall not apply with respect to an applicant for an appointment to a position:

(i) Which is exempt in accordance with § 920.102(b);

(ii) That requires a determination of eligibility for access to classified information;

(iii) Has been designated as a sensitive position under the Position Designation System issued by OPM and the Office of Director of National Intelligence, which describes in greater detail agency requirements for designating positions that could bring about a material adverse effect on the national security;

(iv) Is a dual-status military technician position in which an applicant or employee is subject to a determination of eligibility for acceptance or retention in the armed forces, in connection with concurrent military membership; or

(v) Is a Federal law enforcement officer position meeting the definition in section 115(c) of title 18, U.S. Code.

(2) The prohibition under paragraph (a) of this section shall not apply with respect to an applicant for a political appointment.

(c) *Notification to applicants.* Each agency must publicize to applicants the prohibition described in paragraph (a) of this section in job opportunity announcements and on agency websites/portals for positions that do not require a posting on USAJOBS, such as excepted service positions, and in addition to information on where it has posted about its complaint intake process under as required by part 754 of this chapter.

##### **§ 920.202 Violations.**

(a) An agency employee may not request, orally or in writing, information about an applicant’s criminal history prior to making a conditional offer of employment to that applicant unless the position is exempted or excepted in accordance with § 920.201(b).

(b) A violation (or prohibited action) as defined in paragraph (a) of this section occurs when agency personnel, shared service providers, or contractors (acting on behalf of the agency) involved

in the agency’s recruitment and hiring process, either personally or through automated systems (specific to the agency or governmentwide), make oral or written requests prior to giving a conditional offer of employment—

(1) In a job opportunity announcement on USAJOBS or in any recruitment/public notification such as on the agency’s website or social media;

(2) In communications sent after an agency receives an initial application, through an agency’s talent acquisition system, shared service providers/recruiters/contractors, orally or in writing (including via email and other forms of electronic notification); or

(3) Prior to, during, or after a job interview or other applicant assessment.

(c) When a prohibited request, announcement, or communication is publicly posted or simultaneously distributed to multiple applicants, it constitutes a single violation.

(d) Any violation as defined in paragraph (a) of this section is subject to the complaint and penalty procedures in part 754 of this chapter.

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## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Food and Drug Administration**

#### **21 CFR Chapter I**

[Docket No. FDA–2019–D–4212]

#### **Wholesale Distributor Verification Requirement for Saleable Returned Drug Product and Dispenser Verification Requirements When Investigating a Suspect or Illegitimate Product—Compliance Policies, Revision 1; Guidance for Industry; Availability**

**AGENCY:** Food and Drug Administration, Department of Health and Human Services (HHS).

**ACTION:** Notification of availability.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing the availability of a guidance for industry entitled “Wholesale Distributor Verification Requirement for Saleable Returned Drug Product and Dispenser Verification Requirements When Investigating a Suspect or Illegitimate Product—Compliance Policies, Revision 1.” This revised guidance explains that FDA intends to extend for an additional year (from November 27, 2023, to November 27, 2024), the enforcement policies